Supreme Court, U.S.
FILED
JAN 5 1981
MICHAEL RODAK, JR., CLERK

No. 80-583

In The Supreme Court of the United States

OCTOBER TERM, 1980

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER WHEELING-PITTSBURGH STEEL CORPORATION

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29 December 1980

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Rodak:

re: Wheeling-Pittsburgh Steel Corporation v
National Labor Relations Board, No. 80-583

Please note the enclosure with this letter offered in further support of the position of the Petitioner in the case of Wheeling-Pittsburgh Steel Corporation v National Labor Relations Board, No. 80-583. The enclosure is a copy of Krispy Kreme Doughnut Corporation v N.L.R.B., a case recently decided by the United States Court of Appeals for the Fourth Circuit. The Krispy Kreme case narrates once more the troublesome conflict among the Circuits on the interpretation of "concerted activity" under Section 7 of the National Labor Relations Act. The Petitioner in the instant case submits that the confusion surrounding "concerted activity" will remain until and unless this Honorable Court addresses the issue.

In Krispy Kreme the Fourth Circuit cites the Third Circuit's decision in Wheeling-Pittsburgh Steel Corporation v N.L.R.B., 618 F.2d 1009 (3d Cir. 1980), the instant case. (Footnote 4, Krispy Kreme). The citation reveals that the Fourth Circuit has relied upon the Third Circuit's version of the facts in the present case. The Petitioner has vehemently contested the factual findings as having no foundation in the record and being an invention of the National Labor Relations Board, first appearing in the Board's Brief in the lower court. Thus, the Wheeling-Pittsburgh case is now being cited in a misleading manner in an erroneous proposition.

Finally, the split in the Circuits on the "concerted activity" issue has been discussed in a recent issue of the Legal Times of Washington, December 8, 1980, "'Constructive Concerted Activity': Legal Nightmare", Smith and Lohman, pp. 19-21. The article focuses upon the different

postures of the Circuit Courts and the Board in connection with interpretation of Section 7.

The Petitioner reemphasizes that the instant case deals with a split among the Circuit Courts on interpretation of Section 7 of the National Labor Relations Act, a statute of major nation-wide significance in the realm of industry peace. The Petitioner prays this Honorable Court grant the Petition for a Writ of Certiorari in this case.

Very truly yours,

Donald L. Dotson

lb

Enclosures

DECISION OF FOURTH CIRCUIT IN KRISPY KREME DOUGHNUT CORP. v. NLRB
(TEXT)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1645

Krispy Kreme Doughnut Corp., Petitioner,
-versus-
National Labor Relations Board, Respondent.
Bakery, Confectionery and
Tobacco Workers International
Union, AFL-CIO, CLC, Intervenor.

On Petition for Review of an Order of the National Labor Relations Board.

Argued: August 21, 1980. Decided: December 8, 1980

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

H. Lane Dennard, Jr. (Jonathan P. Pearson, Ogletree, Deakins, Smoak, Stewart & Edwards on brief) for Petitioner; Lafe E. Solomon, National Labor Relations Board (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Kenneth B. Hipp, Deputy Assistant General Counsel on brief) for Respondent; Judith E. Kincaid (Shelley Blum, North Carolina Labor Law Center on brief) for Intervenor.

RUSSELL, CIRCUIT JUDGE:

The petitioner-employer seeks review of a Board order finding the discharge of the employee Terry Boggs by the petitioner violative of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §151, et seq., and requiring reinstatement and back pay. 1/ We deny enforcement of the order.

Terry Boggs was initially employed by the petitioner on August 10, 1976 and was discharged on July 31, 1978, almost two years later. During that period he had filed four workmen's compensation claims and one lawsuit against his employer. In addition, he had been unable to work for almost four months during this period. It is the petitioner's position that all the claims were "of dubious validity." One of his claims alleged injuries to his shoulder sustained when he entangled his arm in a stair rail at work, and another claim was for neck and back injuries, which occurred when he fell over backwards in a swivel chair. His final claim on July 27, 1978 related to chest pains allegedly experienced by him at work, which he claimed were due to conditions in his working environment. At this point, the personnel director of the petitioner investigated Boggs' latest complaint and his accident and claims record, as well as his working conditions. Following this, Boggs was discharged. The reason assigned by the petitioner for the discharge was that Boggs, by his record as an employee, had shown a careless attitude towards safety and "a preoccupation with filing claims for compensation."

A complaint under the Act was then issued by the National Labor Relations Board, and, after a hearing, the Administrative Law Judge concluded that "[petitioner herein] violated Section 8(a)(1) of the Act on July 31, 1978, by discharging Terry Boggs because of his expressed intention to file a workmen's compensation claim" 2/ on account of his complaints on July 27, 1978, and "that Boggs' refusal to forebear from filing a claim for workmen's compensation falls within the protected ambit of Section 7 and * * * for that of the Administrative Law Judge were accepted by the Board, which, on that basis, entered the order challenged by the petitioner.

The issue posed by petitioner's challenge to the Board's order is whether, as a matter of law under the Act, discharge of an individual employee for refusing to forego a workmen's compensation claim constitutes protected "concerted activity" authorizing the issuance of a cease-and-desist order under Section 7 of the Act. (29 U.S.C. § 157). For purposes of this appeal only it may be considered as undisputed that Boggs' discharge was as found by the Board. There is thus no factual issue, only a legal issue requiring a judicial construction of the term "concerted activity" in the Board's authorization statute. If such a discharge for the reason assigned is not "concerted activity," enforcement should be denied. Conversely, if it is, enforcement should be ordered. On that basis we proceed to a construction of the term "concerted activity" under Section 7 of the Act.

So far as this proceeding is concerned, Section 7 protects an employee from retaliation by his employer only on account of employee action which may be found to be "concerted activities for the purpose of collective bargaining or other mutual aid or protection." "Concerted activity," under the statute, read literally, would appear to require more than a single participant. And some authorities have held just that. N. L. R. B. v. C & I Air Conditioning, Inc., 486 F. 2d 977, 978, (9th Cir. 1973); N. L. R. B. v. Northern Metal Company, 440 F. 2d 881, 884 (3d Cir. 1971); see, Note, Constructive Concerted Activity and Individual Rights: The Northern Metal- Interboro Split, 121 U. Pa. L. Rev. 152, 153 (1972). 3/

There are however, other cases, supported by scholarly comments, which find too narrow and artificial this construction of the term "concerted activity," a term which they characterize as more "a term of art rather than a factual description." Anchortank, Inc. v. N. L. R. B., 618 F. 2d 1153, 1160 (5th Cir. 1980); cf., Note The Requirement of "Concerted" Action under the NLRA, 53 Colum. L. Rev. 514, 517 (1953). These decisions point to the words in the statute which qualify, or make clear the scope of, the term "concerted activities" ("for the purpose of * * * mutual aid or protection")

1/ 245 NLRB No. 135 (1979)

2/ There was some contention that Boggs' discharge was related to his supposed union activities. The Administrative Law Judge found no basis for this claim and dismissed it. Thus, the only basis for a violation of the Act in this case related to the finding that Boggs was discharged because he refused to forego filing a workmen's compensation claim.

3/ In C & I Air Conditioning, the Court said at p. 978:

> Our circuit has indicated that the term "concerted activity" means that the employee must be acting "with or on behalf of other employees, and not solely by and on behalf of the discharged employee himself."
>
> In Northern Metal, the Court said (p. 884):
>
> Webster's New International Dictionary (2d ed. 1947) defines "concert" as "agreement in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme; harmony; simultaneous action" and "concerted" as "mutually contrived or planned; agreed on." We do not believe the purpose of the Act would be served by expanding the limits of Mushroom to include activity which could be considered "concerted" only in a fictional sense.

and, taking the two phrases together ("concerted activities" and its qualifying phrase "for the purpose of • • • mutual aid or protection"), conclude that it is the sense and intent of the statute that an action by a single employee may be treated as "concerted activity," even though participated in by a single employee, provided, but only provided, the action looks to group rather than mere individual action, and includes "some element of collective activity or contemplation thereof," 4/ or it is shown "that the individual in fact was acting on behalf or, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense." 5/

It will not satisfy this condition for Board action under Section 7 that an employee's complaint may be directed at working conditions which affect all employees; "[i]t is . . . necessary . . . that the employee's actions themselves at least contemplate such group activity [in order to support Board jurisdiction]. As was explained in Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967), 'in order to prove a concerted activity under Section 7 of the Act, it is necessary to demonstrae that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint.' Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d 23, 28 (7th Cir. 1980). This construction of the statutory language determinative of when the action of a single employee will be deemed "concerted activity" within Section 7, is illustrated by Mushroom Transportation Company v. N.L.R.B., 330 F.2d 683, 685 (3d Cir. 1964):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. 6/

This definition of "concerted activity," as applied to the action of a single employee was recently reaffirmed in Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d at 28, in which the finding of the Board that the conduct of an employee complaining of working conditions in that case constituted "concerted activity" within the meaning of Section 7.

We appear to have adopted this same construction of the statutory language. Thus, in Owens-Corning Fiberglas Corporation v. N.L.R.B., 407 F.2d 1357 (4th Cir. 1969), we enforced an order of the Board finding "concerted activity" in the action of two employees in preparing and seeking from fellow employees signatures on a petition complaining of working conditions. In doing do, however, we said:

> Their activity (i.e., that of the two employees) both prior and subsequent to the actual signing of the petition was plainly intended to enlist the support and assistance of other employees for the purpose of correcting what the workers thought to be an inadequacy in working conditions. The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. The one seldom exists without the other. 7/ Id. at 1365 (Italics added)

This distinction under Section 7 between individual action "intended to enlist the support and assistance of other employees" and action "for the benefit of other employees only in a theoretical sense" is illustrated by the different results in our cases of Joanna Cotton Mills Co. v. National Labor Relations Bd., 176 F.2d 749 (4th Cir. 1949) and Owens-Corning Fiberglas Corp. v. N.L.R.B., supra. In Joanna Mills, it was said that it is "the 'purpose' of the activity" of the employee that determines whether the complaint of the employee is within Section 7 and that such "purpose" "must be the mutual aid or protection of the employees." 176 F.2d at 153. Because it concluded that the complaint of the employee, though involving working conditions, represented a personal grievance asserted as such and was not "for the purpose of inducing or preparing for group action to correct a grievance or a complaint," 8/ the Court in that case found that there was not "concerted activity" within Section 7. In Owens-Corning Fiberglas, on the other hand, the action of the employees was "plainly intended to enlist the support and assistance of other employees for the purpose of correcting . . . an inadequacy in working conditions." 407 F.2d at 1365. Under those circumstances, the Court did find "concerted activity."

The Board in effect concedes that there is no evidence that the action of the solitary employee in this case intended or contemplated any group activity or that he was "in fact . . . acting on behalf of or as representative of, other employees;" at most his action can be said to have been "for the benefit of other employees only in a theoretical sense." 9/ Thus, his actions did not satisfy the requirements as stated in Mushroom, Owens-Corning Fiberglas and similar cases as a basis for a finding of "concerted activity" in the instance of a complaint by a single employee.

It is true, as the Board argues, that a number of courts, following the rule announced in N.L.R.B. v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), have held "that complaints by an individual employee in an effort to enforce provisions of a collective bargaining agreement amounted to concerted activity under § 7 of the Act, even in the absence of interest by fellow employees in the complaints." 10/ The rationale for this rule, as stated by the Court both in ARO, Inc. v. N.L.R.B., 596 F.2d at 716, and in N.L.R.B. v. C & I Air Conditioning, Inc., 496 F. 2d at 976, as well as by the Board itself in Bunney Bros.

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4/ Wheeling-Pittsburg Steel v. N.L.R.B., 618 F.2d 1009, 1017 (3d Cir. 1980); Dreis & Krump Mfg. Co., Inc. v. N.L.R.B., 544 F.2d 320, 327 (7th Cir. 1976); N.L.R.B. v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973); Mushroom Transportation Company v. N.L.R.B., 330 F.2d 683, 685 (3d Cir. 1964).

5/ ARO, Inc. v. N.L.R.B., 596 F.2d 713, 717 (6th Cir. 1979).

6/ This conclusion was recently restated by the same court in Wheeling-Pittsburgh Steel v. N.L.R.B., 618 F. 2d 1009. In that case the complaint was by two employees but their action was supported by "the action of fellow workers and union representation" and involved "from the beginning . . . some group action by fellow workers in the interest of employee safety." Id. at 1017. (Empahsis added)

The decision in Mushroom has been repeatedly followed by other circuits, including our own.

7/ A similar case is Community Hosp. of Roanoke Val., Inc. v. N.L.R.B., 538 F.2d 607 (4th Cir. 1976). In that case, two employees engaged in a union organizing effort at the Hospital had gone on the radio to state their reasons for their unionization effort. For this they were discharged. The Board found that the action of the employees, which resulted in their discharge was action intended for the common benefit and mutual protection of all employees and not in the promotion of an individual grievance. It accordingly met the test of Mushroom and Owens-Corning Fiberglas. The fact that the conduct was "outside the immediate employee-employer relationship" was unimportant; the critical fact was that it was action related intimately to efforts by way of group activity to improve working conditions. Eastex, Inc. v. NLRB (1978), 437 U.S. 556, 565.

8/ See Pelton Casteel, 627 F.2d at 28.

9/ See ARO, Inc. v. N.L.R.B., 596 F.2d at 717.

10/ ARO, Inc. v. N.L.R.B., 596 F.2d at 716.

Construction Co., 139 NLRB 1516, 1519 (1962), is that individual action seeking to implement the terms of a collective bargaining agreement is merely an extension of the concerted activity which gave rise to the agreement in the first place (constructive concerted activity). 11/ This reasoning, however, has not been accepted by all courts. In N. L. R. B. v. Northern Metal Company, 440 F.2d at 884-85, the Court, branding the finding of "constructive concerted activity" in Interboro as a pure "legal fiction," said it was "unwilling to adopt such a fiction." And in Buddies Supermarkets, Inc., supra, at 719-20, the Court declared "that the Interboro decision has not received wide acceptance." 12/ It is, however, unnecessary for us to determine in this case whether Interboro is to be applied in this Circuit, since there is no collective bargaining agreement and, therefore, no foundation for a finding of "constructive concerted activity" under the rationale adopted in Interboro.

And the Board recognized that this case did not qualify under Interboro because of the absence of a collective bargaining agreement, but it asked that we extend the fiction of "constructive concerted activity" found in Interboro by holding that an individual employee is engaged in "concerted activity" whenever he or she acts in a matter which arises out of an employment relationship and may be of common interest to other employees since it is reasonable to presume that other employees, if they know of the complaint, would have joined in, thereby supporting the essential element of group or concerted action. It would apply this holding which relies on a presumption of group conduct and participation, particularly in situations where the employee's complaint relates to federal or state work safety or employment compensation statutes. It argues that the adoption of such a rule would create a presumption, which had the effect of merely shifting the burden of proof. It is significant, though, that the Board confesses in its brief in this court that no proceeding in which it has proposed this theory has the Board suggested "the precise manner whereby an employer might obtain evidence to rebut the presumption" that other employees identified with the complaint. It follows, therefore, that the Board would set up a presumption which in practical effect it would be impossible for an employer to rebut and thus would constitute an irrebuttable presumption.

The Board cites no circuit decision supporting its theory of presumed "concerted activity" in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" meeting the threshold requirement under Section 7. N. L. R. B. v. C & I Air Conditioning, Inc., supra (complaint covering safety on the job site). See, also, N. L. R. B. v. Dawson Cabinet Co., Inc., supra (violative of the Equal Pay Act). Thus, in N. L. R. B. v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980), the Court said:

> We disagree that the filing of a safety complaint in the circumstances of the case constituted a protected concerted activity. The Board found that Mortensen had acted alone in filing the complaint; however, it relied upon Alleluia Cushion Co., Inc., 221 N. L. R. B. 999 (1975), to find concerted activity. In Alleluia Cushion the Board found that when an employee acts alone in filing a safety complaint, the consent of the other employees will be implied and the activity will be deemed concerted. This is an extension of the principle established in NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), that "activity engaged in by an individual employee acting alone which was directed to enforce or implement the terms of a collective bargaining agreement will be deemed concerted activity within the meaning of §7." NLRB v. Dawson Cabinet Co., Inc., 566 F.2d 1079, 1082 (8th Cir. 1977). The rationale of the decision was that the implementation of the agreement by the employee was an extension of the concerted activity giving rise to the agreement.
>
> NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973) governs the disposition of this issue. It involved, as this case does, the filing of a safety complaint. Although it predated Alleluia Cushion, without deciding the validity of Interboro, we refused to extend it to situations where there was no collective bargaining agreement involved. Such an agreement is essential because it is the source of the employee's claimed rights. NLRB v. C & I Air Conditioning, Inc., 486 F.2d at 979. Therefore, we must reject the Board's finding that Mortensen engaged in protected concerted activity.

And this conclusion as stated in Bighorn Beverage is easily understood. "Concerted activity" is an essential predicate, in effect a jurisdictional requirement, for Board action under the Act in a case such as this. The burden of establishing by proof such essential predicate to quasi-jurisdiction rests on the Board. It would be odd, indeed, if this essential quasi-jurisdiction predicate might be supplied by a presumption admittedly resting on no factual base but predicated on a purely theoretical assumption. In essence, what the Board would do under its argument would be to reverse the trial procedure in this context by requiring the employer in any proceedings under the Act to rebut the Board's authority to act before the Board would be required to prove its quasi-jurisdictional basis for the proceeding. We cannot accept such a novel argument which goes far beyond the rationale on which Interboro was grounded. In our opinion, the Board completely failed to establish "concerted activity" in this case and enforcement is accordingly denied.

ENFORCEMENT DENIED.

11/ See also, N. L. R. B. v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980), where the Court said:

> The rationale of the decision [in Interboro] was that the implementation of the agreement by the employee was an extension of the concerted activity giving rise to the agreement.

Often courts have read in Interboro the rationale that, since the treatment of an individual employee's complaint or grievance under a collective bargaining agreement will necessarily have an effect on other employees covered by the agreement in their conception of the values of the collective bargaining agreement an individual employee's complaint in those circumstances "may be deemed to be for concerted purposes." Again, though, as we later indicate, this point is unimportant in this proceeding since Interboro only applies where there is a collective bargaining agreement. See Anchortank, Inc. v. N. L. R. B., supra, 618 F.2d at 1160-61; N. L. R. B. v. Ben Pekin Corporation, 452 F.2d 205, 206-7 (7th Cir. 1971).

12/ To the same effect is N. L. R. B. v. Dawson Cabinet Co., Inc., 566 F.2d 1079, 1084 (8th Cir. 1977).

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No. 80-583

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OCTOBER TERM, 1980

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER WHEELING-PITTSBURGH STEEL CORPORATION

THE EVIDENCE

In its Brief in Opposition to the Petition for Certiorari, the Board proposes an additional issue on the question of "substantial evidence." Petitioner concurs in this issue and urges that the Board's evidence in support of its findings and conclusions be reviewed. Most of Petitioner's 42 Exceptions to the Decision of the Administrative Law Judge concerned the lack of support in the record for his findings and conclusions which were summarily adopted by the Board and the Court of Appeals. His disregard of the Company's uncontroverted evidence on critical issues should also be reviewed. The Board has also made several unsupported statements of fact in its Brief to this Court:

1. In footnote 1 of its Brief, the Board states that steel pipe is carried over the heads of 35 employees.

Loads are not carried over employees' heads and there is no evidence to support the Board's statement. Carrying loads over employees is contrary to safety practice. Specific instructions prohibit it, and procedures and devices (lights and horns) are designed to prevent such occurrences.

2. At page 2, the Board attempts to create "concerted activity" by saying Semancik *and the hookers* went to explain the situation to Michaels. There is no evidence that the hookers were at any time allied with Semancik or considered themselves to be in any danger. The same is true of the other employees who were put out of work by Semancik's refusal to operate the crane. This proposition was never advanced at the trial, the only reasonable inference, if any, being that the hookers had nothing to do and followed along to see what the outcome would be, that is, whether they would be working. There is no evidence that they entered into the discussion or showed any sign of protest. To the contrary, they continued working as soon as crane service was restored. The theory that they were in concert with Semancik appeared for the first time in the Board's Brief to the Court of Appeals.

3. The Board's Brief refers to the "unsafe crane." Not only is there no evidence that the crane was unsafe, but there is substantial evidence that the crane was safe and that there was no reasonable basis for refusing to operate it. At the trial the Board was satisfied to attempt to show only that Semancik and Roberts *believed* it to be unsafe.

4. At page 4 of its Brief, the Board states that "Roberts agreed that the crane would be unsafe and dangerous to the hookers as they loaded pipes onto railroad cars . . ." This is another attempt to create "concerted activity." Roberts never made such a statement. There is nothing in the record to support

the Board's statement even as a characterization of statements by Roberts or his reasons. To the contrary, there is nothing to suggest that he acted other than on his own behalf. *The Board's own witness,* Miles, testififed as follows on cross examination concerning the refusals to operate the crane (181a):

> JUDGE BISGYER: Let's get back to Mr. Semancik. Do you honestly believe that Mr. Semancik did not believe that the crane was unsafe?
>
> THE WINTESS: Yes sir, I do, based on his actions and his position at the time.
>
> Q (By Mr. Dotson) How about Mr. Roberts?
>
> A I believe — are you asking me my opinion?
>
> Q Yes?
>
> A I believe Mr. Roberts was coerced by Mr. Semancik, that's the reason he took the position that he took.
>
> Q Do you think his position was unreasonable?
>
> A Yes sir, I do.
>
> Q Do you think he had a real basis to have an opinion about whether the crane was safe?
>
> A No sir, I don't. (The witness goes on to explain the factual basis for this testimony and to totally contradict the testimony of Semancik.)

The Board also attempts to create "concerted activity" when it quotes the Court of Appeals at pages 7-8 of its Brief. The quote reveals that the Court relied on the Administrative Law Judge's findings that Semancik had declared a concern for the safety of his fellow employees. The record proves this finding to be devoid of any basis in evidence. Accordingly the Board states on page 9 of its Brief that the Company challenges the contrary finding of the Board and the Court of Appeals; the Board cannot and does not state that the Company's assertion is contrary to the evidence.

The Company's evidence is redundant that a spall on a welded wheel is nothing more than ordinary wear and tear and presents no risks beyond those normally inherent in the job. On this point, the Board presented only the uncorroborated opinions of the two employees who were suspended. The possibility that the wheel might eventually wear out as the result of the spall or any other reason is also normally inherent in the job and presents no basis for refusing to work. The Company is fully within its rights to install and operate a wheel such as the one in question and to expect its employees to operate the crane with such a wheel. The Board presented neither the evidence nor the expertise to hold otherwise.

5. The Court of Appeals, cited in footnote 11 of the Board's Brief, is quoted as finding, like the Administrative Law Judge, that there is "ample evidence in the record to support the finding that the refusals to operate the crane were not solitary acts by individual employees . . ." The conclusion of the Administrative Law Judge in this regard is simply not supported by the record. The same is true of the conclusion that there was objective evidence of any unsafe condition within the meaning of the labor agreement or relevant

statutes.

Contrary to the Board's assertion, an examination of the evidence in this case reveals circumstances significantly identical to those in *Kohls v. NLRB*, 629 F. 2d 173 (D.C. Cir. 1980).

The Board cites *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) as authority for its *ipse dixit* treatment of this case. *Universal Camera* does not, however, foreclose examination of the Board's determinations with respect to the evidence nor does it relieve the Board of the burden of proof and the laws of nature. The analysis of the 8th Circuit in *NLRB v. Fruin-Colnon Construction Co.*, 330 F. 2d 885 (1964) is equally applicable to this case:

> In short, the uncontradicted documentary, photographic and other valid evidence of the physical facts, complementing the reasonable inference of nomalcy of the protested working conditions drawn from the credited, disinterested testimony of Williams (not to mention the considerable, supportive testimony of respondent's witnesses which the Examiner discredited *in toto*) compels our conclusion that the Board's determination that abnormally dangerous circumstances justififed the walkout is based upon isolated testimony of the alleged discriminatees and unreasonable inferences which are unsubstantial considering the record as a whole. (footnote and citations omitted) Furthermore, credibility findings of the Board contradictory of substantial evidence of the laws of nature and undisputed documentary testimony need not rigidly control appellate review of all the evidence. (citation omitted)

JURISDICTION AND DEFERRAL

The Board is either confusing the issue of jurisdiction with the issue of deferral to arbitration or is raising an additional issue. The Company has raised in its Petition and from the beginning of this case the issue of the Board's jurisdiction over a dispute concerning nothing more than rights under the collective bargaining agreement. Deferral is a separate issue having to do with the Board's policy of "deferring" to arbitration decisions for the resolution of violations of the labor laws if the decision and the procedure meet various and frequently changing criteria. At the time this case arose and was tried, it was the Board's stated policy not to defer in cases involving alleged violations of employees' Section 8(a)(1) and (3) rights. The Administravite Law Judge made it clear at the beginning of the proceeding that he would not withhold Board action pending arbitration (19a):

> JUDGE BISGYER: Well, let's proceed. There hasn't been an award, and if there were an award, and the General Counsel had claimed that the award was repugnant to the rights accorded parties under the Act, we'd go through the procedure to determine what the facts are, and to determine whether the award coincides with the law.

The Company took the position that this case was indistinguishable from many other disputes concerning the rights under the labor agreement and should be resolved through arbitration; that whether the Company was right or wrong in its interpretation of the labor agreement and the discipline imposed is not for the Board to decide; that it certainly is not a

per se violation of the Act for the Company to impose discipline in good faith and in the absence of anti-union animus; that the Board had no jurisdiction. The following appears at the end of the Company's Trial Brief, which appears in evidence as Respondent's Exhibit 2:

> This, like almost every discipline or interpretation case, is nothing more than a routine matter for the arbitrator, who has the authority to adjust the discipline if he believes it is too severe or to determine if the Corporation or the employees misinterpreted the contract.
>
> . . . An unfair labor practice as alleged by the complainant . . . did not occur and the instant complaint must be dismissed.

The question of the Board's jurisdiction over this dispute was treated at length in the Exceptions and Brief before the Board and before the Court of Appeals.

The question of "deferral" arose while the case was pending before the Court of Appeals as a result of the Board, on its own motion, withholding action pending arbitration in another case, *Wheeling-Pittsburgh Steel Corporation*, NLRB Case No. 6-CA-12875 (1980 unreported), involving similar allegations and the same statutory provisions at the same plant of Wheeling-Pittsburgh. Because of this apparent change of policy or inconsistent action on the part of the Board, the Company took the position, as an alternative to its other positions, that the Semancik-Roberts case should at least be deferred to arbitration or that it should be remanded to the Board for clarification of its deferral practices, which are in a state of ex-

treme confusion and inconsistent application. (See "Arbitrators and the Board," *57 North Carolina Law Review 91* (October 1979) in which the author concludes "I simply don't think it is possible to know at present when the Board will and will not defer to any thing.")

Contrary to the Board's representations to the Court of Appeals and its brief before this Court concerning the practice of deferral before arbitration has taken place, Wheeling-Pittsburgh is informed and believes that the Board *does* withhold action pending arbitration on an inconsistent, *ad hoc* basis with or without a specific request by a respondent. The Board is well aware of the long-standing and comprehensive arbitrability of disputes in Wheeling-Pittsburgh and the other eight companies which comprise "big steel" and have the same basic labor agreement. The Administrative Law Judge was reminded of this at the beginning of the trial (17-18a), immediately before he ruled that he would, in accordance with the General Counsel's position, proceed to hear the case. (19a, *supra)*

Wheeling-Pittsburgh does not object to the Board making an issue of deferral before this Court; however, deferral should not be confused with the more essential issue of the Board's lack of jurisdiction to hear a contract dispute, correct disposition of which would preclude reaching the deferral issue. With respect to the adequacy of the Company's compliance with the Board's purported "deferral practice" it is the Company's position that its objections to the Board's hearing the case, made throughout the proceedings, are sufficient to encompass deferral or any other grounds that would have precluded Board action. Whatever the Board's deferral practice may be, it is basic that jurisdiction may be raised at any

time and cannot be conferred even by the consent of the parties. *Smith v. Spina*, 477 F.2d 1140, 1145 (CA3, 1973)

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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